PENGURUSAN DANAHARTA SDN BHD

v.

KASAWA (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[COMPANIES WINDING-UP PETITION NO: D6-28-112-2002]
18 FEBRUARY 2004

COMPANY LAW: *Winding-up - Petition - Stay of petition - Earlier winding-up order stayed - Whether petitioner required leave of court to commence present winding-up petition - Whether petition ought to be dismissed - Companies Act 1965, s. 226(3)*

This was an application by the respondent pursuant to s. 222 of the Companies Act 1965 ('the Act') for a stay of a winding-up petition by the petitioner on the ground that there was already in existence a winding-up order against the respondent, and that the petitioner had not obtained the leave of court to commence the present winding-up petition against the respondent as required by s. 226(3) of the Act. The petitioner submitted that leave of court pursuant to s. 226(3) of the Act was not required because the earlier winding-up order had been stayed by the winding-up court, and that once a court stays a winding-up order, the winding-up order comes to an end.

Held:

[1] As a matter of law, the stay order, being in the nature of a stay pending appeal and thus not absolute in nature, did not wipe out or bring an end to the winding-up order. As long as the winding-up order was still in existence, s. 226(3) of the Act applied, and the petitioner should have sought leave of court before presenting the petition. Therefore, the presentation of the present petition without prior leave of court was a breach of that provision; hence, the petition was bad in law and should be dismissed. (pp 477 g-h & 478 a)

[Application allowed; petition dismissed.]

Case(s) referred to:

BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd [1996] 1 BLJ 307 HC ***(dist)***

Vijayalakshmi Devi v. Jegadevan [1995] 2 CLJ 392 CA ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(1)(e), 222, 226(3), 243(1)

For the petitioner - SY Ng (Dayangku Mariana); M/s Raja, Darryl & Loh
For the respondent - HC Tee; M/s Tee & Partners

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:
On 28 January 2002, the petitioner presented a winding-up petition (the present petition) against the respondent under ss. 217(1)(b) and 218(1)(e) of the Companies Act 1965. This petition has yet to be heard.

Prior to the presentation of the present petition, the respondent, pursuant to a petition of another creditor, had already been wound up by the Kuala Lumpur High Court on 24 May 2000 *vide* Companies Winding-up Petition No. D8-28-25-2000.

The respondent had since appealed to the Court of Appeal against that winding-up order.

Meanwhile, a contributory of the respondent in the D8-28-25-2000 case, known as Mayform Holdings Sdn Bhd had, on 19 October 2000, obtained from the Winding-up Court a stay order of the previous winding-up order pending the appeal pursuant to s. 243(1) of the Companies Act.

Section 243(1) reads:

> **Power to stay winding up**
>
> 243. (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

The present summons-in-chambers is an application by the respondent pursuant to s. 222 of the Companies Act for a stay of the present winding up proceeding on the ground that there is already in existence a winding-up order against the respondent and that the petitioner has not obtained the leave of court to commence the present winding-up petition against the respondent as required by s. 226(3) of the Companies Act.

Section 222 states:

> **Power to stay or restrain proceedings against company.**
>
> 222. At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

Section 226(3) provides:

> **Actions stayed on winding up order.**
>
> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except –
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

Alternatively, on the same ground, the respondent applies to the court for the present petition to be dismissed.

In opposing the present application, the learned counsel for the petitioner submitted that leave of court pursuant to s. 226(3) is not required because the winding-up order of 24 May 2000 had been stayed by the Winding-up Court. Learned counsel argued that once a court stays a winding-up order, the winding-up order comes to an end. Learned counsel referred to *BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd* [1996] 1 BLJ 307.

I have allowed the application but in my judgment the present petition should not be stayed but should be dismissed. Accordingly I have dismissed the present petition with costs.

In my opinion, in view of the previous winding-up order, the presentation of the present petition, without prior leave of court, as stipulated by s. 226(3), is a breach of that provision and hence the petition is bad in law and should be dismissed. The petition should not have been filed in the first place.

With respect, I am unable to agree with the submission of the learned counsel for the petitioner regarding the effect of the stay order. Upon a close reading of the provision of s. 243(1), it will be noted that the relevant part reads:

> … the Court may, … make an order staying the proceedings either altogether or for a **limited time** …[Emphasis added]

Thus, in the context of a winding-up order, there are two types of stay order:

(a) the "altogether" (or absolute or unlimited) type of stay order; or

(b) the "limited time" type stay order.

For the purpose of s. 226(3), it is important to distinguish these two types of stay order.

Now, the relevant part of the stay order in the present case reads:

> (ii) that a stay of the Winding-Up Order dated 24.5.2000 be allowed pending the Respondent's appeal to the Court of Appeal pursuant to Section 243(1) of the Companies Act 1965;

Thus, the stay order in the present case, being in the nature of a stay pending appeal, clearly is of type (b). It is a limited stay order – limited in time. It is not the absolute or the unlimited type. It is not the "altogether" type.

In my judgment, the stay order of 19 October 2000, being limited in time and thus not absolute or not unlimited in nature, does not relieve the petitioner of the requirement to obtain leave under s. 226(3). The provision of s. 226(3) is clear. It says:

> When a winding up order has been made …

It is undisputed in the present case that a winding up order had been made. In my view, the winding-up order is still in existence notwithstanding the stay order. As a matter of law, the stay order, being in the nature of a stay pending appeal, and thus not absolute in nature, does not wipe out, or brings an end to, the winding-up order. In *Vijayalakshmi Devi v. Jegadevan* [1995] 2 CLJ 392 NH Chan JCA, delivering the judgment of the Court of Appeal, said (at p. 396):

> The stay of operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order. **It does not mean that the said order has been wiped out from existence** … [Emphasis added]

So long as the winding-up order is still in existence, s. 226(3) applies; and the petitioner must seek leave of court before presenting the petition.

BSN Commercial Bank, cited by the learned counsel for the petitioner, does not support the petitioner's argument because in that case, unlike the present case, the stay order (of the winding-up order) was not a stay order pending appeal but a stay order expressed in unlimited terms. It was an absolute stay order. It was of the "altogether" type. Furthermore, that case does not involve the application or interpretation of s. 226(3).

Be that as it may, I think I should also add here that in the present case, it would have been a different matter if the stay order of 19 October had been of the (a) type, that is to say, it had been to stay the winding-up order "altogether" (to borrow the word used in s. 243(1)), instead of merely a stay pending appeal. For the effect of an "altogether" (or absolute, or unlimited) stay order would be to totally discontinue or to terminate the winding-up order. In *Vijayalakshmi* the Court of Appeal said (at p. 395):

> The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings.

And in *BSN Commercial Bank* Abdul Malik Ishak J said:

> *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 at pp 693-694 laid down a principle akin to that of *Vijayalakshmi Devi* in that the order of a stay of the winding-up, if expressed in unlimited terms, would put an end to the winding-up process and the company can thereupon resume the conduct of its business and affairs as if no winding-up existed at all.

If the stay order had been of the unlimited or absolute type, then, leave of court under s. 226(3) would not be required.

Application allowed; petition dismissed with costs.